IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH

&

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

MONDAY, THE 12TH MARCH 2007 / 21ST PHALGUNA 1928

RFA.No. 30 of 2006()

AGAINST THE ORDER DATED 31/03/2005 IN FD IA 161 1999 IN OS.21/1997 of SUB COURT, KASARAGOD

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: APPELLANTS/RESPONDENTS/DEFENDANTS

RAMAKKE, W/O.SANKAPPA SHETTY (DEAD).LRs. ARE ALREADY IN PARTY ARRAY AS APPELLANTS 1 AND 2 HEREIN.

1.KORAGAPPA SHETTY, S/O.SANKRAPPA SHETTY, RESIDING AT KELAGINAMANE, KUNJATHUR VILLAGE, KASARAGOD TALUK.

2. RAMANATHA SHETTY,
S/O.SANKAPPA SHETTY, RESIDING AT SANNADKA,
KUNJATHUR VILLAGE, KASARAGOD TALUK AND POST
KUNJATHUR.

3. SUNDARI, W/O.BANTAPPA SHETTY RESIDING
AT SANNADKA,
KUNJATHUR VILLAGE AND POST,
KASARAGOD TALUK.

4. JAYANTHI, D/O.BANTAPPA SHETTY,
RESIDING AT SANNADKA, KUNJATHUR VILLAGE
AND POST, KASARAGOD TALUK.

5. MOHANDAS SHETTY,
S/O.BANTAPPA SHETTY, RESIDING AT SANNADKA,
KANJATHUR VILLAGE AND POST, KASARAGOD TALUK.

6. CHANDRAHASA SHETTY,
S/O.BANTAPPA SHETTY, RESIDING AT SANNADKA,
KUNJATHUR VILLAGE AND POST, KASARAGOD TALUK.

7. YESHODHARA SHETTY,
BANTAPPA SHETTY,RESIDING AT SANNADKA,
KUNJATHUR VILLAGE AND POST, KASARAGOD TALUK.

8. LALITHA, D/O.BANTAPPA SHETTY,
RESIDING AT SANNADKA, KUNJATHUR VILLAGE AND POST,
KASARAGOD TALUK.

9. INDIRA, D/O.BANTAPPA SHETTY,
RESIDING AT SANNADKA, KUNJATHUR VILLAGE AND POST,
KASARAGOD TALUK.

10. VARIJA, D/O.LATE VENKAPPA SHETTY,
RESIDING AT SANNADKA, KUNJATHUR VILLAGE AND POST,
KASARAGOD TALUK.

11. ANANDAM, S/O.LATE VENKAPPA SHETTY,
RESIDING AT SANNADKA, KUNJATHUR VILLAGE AND POST,
KASARAGOD TALUK.

12. PRABHAKARA, S/O.LATE VENKAPPA SHETTY,
RESIDING AT SANNADKA, KUNJATHUR VILLAGE AND POST,
KASARAGOD TALUK.

13. VIJAYALAKSHMI, D/O.ABBAKKE,
RESIDING AT KELAGINAMANE, KUNJATHUR VILLAGE AND
POST,
KASARAGOD TALUK.

14. SHASHI PRABHA,
D/O.ABBAKKE, RESIDING AT KELAGINAMANE, KUNJATHUR
VILLAGE AND POST,
KASARAGOD TALUK.

15. JAGANNATHA BHANDARI,
S/O.ABBAKKE, RESIDING AT KELAGINAMANE, KUNJATHUR
VILLAGE AND POST, KASARAGOD TALUK.

16. CHITHRAKSHI, D/O.ABBAKKE,
RESIDING AT KELAGINAMANE, KUNJATHUR VILLAGE AND
POST, KASARAGOD TALUK.

17. BHASKARA SHETTY, S/O.KAMALA,
RESIDING AT KARAVOOR, KODIBAIL,
UPPALA VILLAGE AND POST, KASARAGOD TALUK.

18. NARAYANA SHETTY,
S/O.KAMALA, RESIDING AT KARAVOOR,
KODIBAIL, UPPALA VILLAGE AND POST,
KASARAGOD TALUK.

19. VEDAVATHI, D/O.KAMALA,
RESIDING AT KARAVOOR, KODIBAIL,
UPPALA VILLAGE AND POST, KASARAGOD TALUK.

20. GULABI, D/O.KAMALA,
RESIDING AT KARAVOOR, KODIBAIL,
UPPALA VILLAGE AND POST, KASARAGOD TALUK.

21. GIRIJA, D/O.KAMALA,
RESIDING AT KARAVOOR, KODIBAIL,
UPPALA VILLAGE AND POST, KASARAGOD TALUK.

22. SATHISH SHETTY, S/O.KAMALA,
RESIDING AT KARAVOOR, KODIBAIL,
UPPALA VILLAGE AND POST, KASARAGOD TALUK.

23. BABY, W/O.LATE NARAYANA SHETTY,
RESIDING AT MEGERU HOUSE, BOMBRANA VILLAGE AND
POST, KASARAGOD TALUK, VIA.KUMBLA.

24. SUJATHA, D/O.LATE NARAYANA SHETTY,
RESIDING AT MEGERU HOUSE, BOMBRANA VILLAGE AND
POST, KASARAGDO TALUK, VIA.KUMBLA.

25. SUSHEELA, D/O.LATE NARAYANA SHETTY,
RESIDING AT MUGERU HOUSE, BOMBRANA VILLAGE
AND POST, KASARAGOD TALUK, VIA.KUMBLA.

26. SUMATHI, D/O.NARAYANA SHETTY,
RESIDING AT MUGERU HOUSE, BOMBRANA VILLAGE AND
POST, KASARAGOD TALUK, VIA.KUMBLA.

27. KUSHANANDA, S/O.LATE NARAYANA SHETTY,
RESIDING AT MUGERU HOUSE, BOMBRANA VILLAGE AND
POST, KASARAGOD TALUK, VIA.KUMBLA.

28. DEVAPPA A SHETTY, RESIDING AT
K.M.KENAI-CHAL, CHAL NO.2, ROOM NO.219,
HOLI MAIDAN, DHARAVI, BOMBAY-400072.

29. HARISHA, S/O.DEVAPPA A SHETTY,
RESIDING AT K.M.KENAI-CHAL,
CHAL NO.2, ROOM NO.219, HOLI MAIDAN,
DHARAVI, BOMBAY-400072.

30. UDAYA, S/O.DEVAPPA A SHETTY,
RESIDING AT K.M.KANAI-CHAL, CHAL NO.2,
ROOM NO.219, HOLI MAIDAN, DHARAVI,
BOMBAY-400072.

BY ADV. SRI.SURESH KUMAR KODOTH

RESPONDENTS: PETITIONER/PLAINTIFF

DEVAKI, D/O.SHANKAPPA SHETTY,
W/O.UGGAPPA SHETTY,
KUNJATHUR HOSAMANE, KUNJATHUR VILLAGE AND POST,
KASARAGOD TALUK.

BY ADV. SRI.K.G.GOURI SANKAR RAI

THIS REGULAR FIRST APPEAL HAVING COME UP FOR ADMISSION ON 12/03/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

KURIAN JOSEPH & K.T.SANKARAN, JJ.

R.F.A.No.30 of 2006

Dated 12th March, 2007.

J U D G M E N T

Sankaran, J.

The appeal is filed challenging the final decree for partition. As per the preliminary decree, the plaintiff was held entitled to 1/9 share in the plaint schedule properties. Plaintiff applied for passing the final decree. A Commissioner was appointed who submitted plan, report and accounts. The plaintiff was allotted her share from paddy land. All the dry lands which are more valuable were allotted to the 8/9 share of the group consisting of the defendants.

2. Objections were raised by the defendants to the allotments suggested by the Commissioner. They raised a contention that some of the items were not partitioned by the Commissioner on the ground that they are not available. No prejudice would be caused to the defendants by adopting such a course. If those items are also available for partition, the plaintiff would be entitled to her fractional share out of those items as well. Therefore, if some of the items are omitted to be partitioned, the aggrieved party would be the plaintiff and not the

defendants. The plaintiff has no grievance against the division and allotment made by the Commissioner. Therefore, this objection raised by the defendants was rightly rejected by the court below.

3. Another objection raised by the defendants was that items 2 and 6 of the plaint schedule properties were already sold by Sankappa Shetty, the predecessor-in-interest of plaintiff and defendants 1 to 9 and therefore, those items are not available for partition. The question of availability of the items in the plaint schedule was considered at the preliminary decree stage and the parties are concluded by the preliminary decree. At the final decree stage, the defendants are not entitled to raise a contention that items 2 and 6 were sold by their predecessor-in-interest before his death and therefore, those items are not available for partition. The correctness or otherwise of the preliminary decree cannot be canvassed in the final decree proceedings.

4. Another objection raised was that though only the 1/9 share of the plaintiff was declared and only the plaintiff had paid the court fee, the Commissioner had allotted shares of others as well. This objection was considered by the court below

and necessary corrections were made on that aspect. Therefore, that objection does not survive now.

5. The court below found that the Commissioner has made a proper allotment of the properties. The plaintiff is only given her legitimate share in the properties. It is common case that the paddy lands are less valuable than dry lands. Only paddy lands were allotted to the plaintiff and all the dry lands and the house were allotted to the group of the other sharers. No prejudice is caused to the defendants by the allotment made by the Commissioner, which was accepted by the court below. The final decree passed by the court below is legal and proper, and no interference is called for. The appeal lacks merits and it is accordingly dismissed.

KURIAN JOSEPH, JUDGE.

K.T.SANKARAN, JUDGE.

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KURIAN JOSEPH & K.T.SANKARAN, JJ

L.A.A. NO. OF 2004

J U D G M E N T

Dated 8th March, 2007.